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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

PUBLIC SERVICE COMMISSION OF MARYLAND,
Petitioner,

**THE CHESAPEAKE AND POTOMAC TELEPHONE
COMPANY OF MARYLAND,**
Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Are state utility regulatory commissions and their individual members excluded from the definition of "person" in Section 401(b) of the Communications Act, thereby rendering them immune from any suits by the FCC or private parties in federal court to enjoin their refusal to obey an FCC order?

2. Do the federal district courts have jurisdiction under Section 401(b) of the Communications Act (which authorizes suits to enforce "any order" of the FCC except an order for the payment of money) to enjoin a state commission's undenied violation of an FCC ruling that was served on the state commission and required compliance with depreciation rates and methods set by the FCC in proceedings in which the state commission participated?

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT.....	10
ARGUMENT	12
I. THE MARYLAND PSC AND ITS MEMBERS ARE "PERSONS" SUBJECT TO THE JURISDICTION OF THE FEDERAL COURTS UNDER SECTION 401(b)	12
A. Jurisdiction Existed Under Section 401(b) Because the Individual Members of the Maryland PSC Were Named as Defendants and Are Indisputably "Persons"	12
B. Congress Did Not Intend in the Communications Act To Immunize State Commissions from Enforce- ment Proceedings in the Federal Courts	14
II. THE PREEMPTION ORDER IS AN "ORDER" EN- FORCEABLE UNDER SECTION 401(b)	19
A. The Preemption Order Stated Specific Require- ments To Be Followed by the Maryland PSC	19
B. The Substance of the Preemption Order, and Not the Method by Which It Was Adopted, Demon- strates Its Character as an "Order" Under Section 401(b)	22
C. The Enforcement of the Preemption Order Under Section 401(b) Is Consistent with the Policies of the Communications Act	27
1. Private Enforcement of the Preemption Order Advances the Federal Interest and Is Necessary To Prevent Irreparable Harm to Regulated Par- ties	27
2. Private Enforcement Does Not Impinge on the FCC's Role in Administering and Enforcing the Communications Act	30
CONCLUSION	34

TABLE OF AUTHORITIES

Cases:	Page
<i>Ambassador, Inc. v. United States</i> , 325 U.S. 317 (1945) ..	26
<i>American Tobacco Co. v. Patterson</i> , 456 U.S. 63 (1982) ..	13
<i>Atlantic Cleaners & Dyers, Inc. v. United States</i> , 286 U.S. 427 (1932)	24
<i>Baggett v. Department of Professional Regulation</i> , 717 F.2d 521 (11th Cir. 1983)	18
<i>Brookhaven Cable TV Inc. v. Kelly</i> , 428 F. Supp. 1216 (N.D.N.Y. 1977), <i>aff'd</i> , 573 F.2d 765 (2d Cir. 1978), <i>cert. denied</i> , 441 U.S. 904 (1979)	9
<i>California v. FCC</i> , 737 F.2d 388 (4th Cir. 1984), <i>cert.</i> <i>granted</i> , 105 S. Ct. 3497 (1985) (No. 84-889). 6, 9, 16, 22	
<i>Capital Cities Cable, Inc. v. Crisp</i> , ____ U.S. ____, 104 S. Ct. 2694 (1984)	16
<i>The Chesapeake and Potomac Tel. Co. of Maryland v. Pub- lic Service Comm'n of Maryland</i> , 560 F. Supp. 844 (D. Md. 1983)	<i>passim</i>
<i>The Chesapeake and Potomac Tel. Co. of Maryland v. Pub- lic Service Comm'n of Maryland</i> , 748 F.2d 879 (4th Cir. 1984)	<i>passim</i>
<i>Chevron, U.S.A., Inc. v. Natural Resources Defense Coun- cil, Inc.</i> , ____ U.S. ____, 104 S. Ct. 2778 (1984). ...	28
<i>Columbia Broadcasting System, Inc. v. United States</i> , 316 U.S. 407 (1942)	23, 24
<i>Computer and Communications Industry Ass'n v. FCC</i> , 693 F.2d 198 (D.C. Cir. 1982), <i>cert. denied</i> , 461 U.S. 938 (1983)	5
<i>Comtronics, Inc. v. Puerto Rico Tel. Co.</i> , 409 F. Supp. 800 (D.P.R. 1975), <i>aff'd</i> , 553 F.2d 701 (1st Cir. 1977) ...	31
<i>Consumer Product Safety Comm'n v. GTE Sylvania, Inc.</i> , 447 U.S. 102 (1980)	13

TABLE OF AUTHORITIES—(Continued)

Cases:	Page
<i>Edelman v. Jordan</i> , 415 U.S. 651 (1974)	14
<i>Ex parte Young</i> , 209 U.S. 123 (1908)	13, 14
<i>FCC v. American Broadcasting Co.</i> , 347 U.S. 284 (1954)	25
<i>FCC v. ITT World Communications, Inc.</i> , ____ U.S. ____, 104 S. Ct. 1936 (1984)	16, 21, 22
<i>FCC v. Midwest Video Corp.</i> , 440 U.S. 689 (1979)	16
<i>FCC v. National Citizens Committee for Broadcasting</i> , 436 U.S. 773 (1978)	24
<i>FCC v. Pottsville Broadcasting Co.</i> , 309 U.S. 134 (1940)	17
<i>FCC v. Sanders Brothers Radio Station</i> , 309 U.S. 470 (1940)	28
<i>Federal Land Bank of St. Paul v. Bismarck Lumber Co.</i> , 314 U.S. 95 (1941)	15
<i>Florida Public Service Comm'n v. FCC</i> , 737 F.2d 388 (4th Cir. 1984), <i>cert. granted</i> , 105 S. Ct. 3498 (1985) (No. 84-1069)	6
<i>Garcia v. United States</i> , ____ U.S. ____, 105 S. Ct. 479 (1984)	13, 19, 23
<i>General Tel. Co. of California v. FCC</i> , 413 F.2d 390 (D.C. Cir.), <i>cert. denied</i> , 396 U.S. 888 (1969)	17
<i>Georgia v. Evans</i> , 316 U.S. 159 (1942)	15
<i>Georgia v. Pennsylvania R.R.</i> , 324 U.S. 439 (1945)	15
<i>Gulf Offshore Co. v. Mobil Oil Corp.</i> , 453 U.S. 473 (1981)	18
<i>Investment Company Institute v. Camp</i> , 401 U.S. 617 (1971)	28
<i>Kentucky v. Graham</i> , ____ U.S. ____, 105 S. Ct. 3099 (1985)	14

TABLE OF AUTHORITIES—(Continued)

Cases:	Page
<i>Kroeger v. Stahl</i> , 148 F. Supp. 403 (D.N.J.), <i>aff'd</i> , 248 F.2d 121 (3d Cir. 1957)	31
<i>Louisiana Public Service Comm'n v. FCC</i> , 737 F.2d 388 (4th Cir. 1984), <i>appeal filed</i> , 105 S. Ct. 3496 (1985) (No. 84-871)	6
<i>Mountain States Tel. & Tel. Co. v. Department of Public Service Regulation</i> , 588 F. Supp. 5 (D. Mont. 1983)	9
<i>Nader v. Allegheny Airlines, Inc.</i> , 426 U.S. 290 (1976)	32
<i>New England Tel. & Tel. Co. v. Public Utilities Comm'n of Maine</i> , 579 F. Supp. 1356 (D. Me.), <i>vacated</i> , 742 F.2d 1 (1st Cir. 1984), <i>petition for cert. filed</i> , 53 U.S.L.W. 3460 (U.S. Dec. 5, 1984) (No. 84-900)	33
<i>New England Tel. & Tel. Co. v. Public Utilities Comm'n of Maine</i> , 742 F.2d 1 (1st Cir. 1984), <i>petition for cert. filed</i> , 53 U.S.L.W. 3460 (U.S. Dec. 5, 1984) (No. 84-900)	9, 27, 28
<i>North Carolina Utilities Comm'n v. FCC</i> , 537 F.2d 787 (4th Cir.), <i>cert. denied</i> , 429 U.S. 1027 (1976)	5
<i>Northwestern Bell Tel. Co. v. Iowa State Commerce Comm'n</i> , No. 83-688-A (S.D. Iowa Sept. 27, 1984)	9
<i>Ohio v. Helvering</i> , 292 U.S. 360 (1934)	15
<i>Pacific Fruit Express Co. v. Akron, Canton & Youngstown R.R.</i> , 524 F.2d 1025 (9th Cir. 1975), <i>cert. denied</i> , 424 U.S. 911 (1976)	23
<i>Pacific N.W. Bell Tel. Co. v. Washington Utility and Transp. Comm'n</i> , 565 F. Supp. 17 (W.D. Wash. 1983), <i>appeal pending</i> , No. 83-3746 (9th Cir.)	9
<i>Public Utilities Comm'n of Ohio v. FCC</i> , 737 F.2d 388 (4th Cir. 1984), <i>cert. granted</i> , 105 S. Ct. 3498 (1985) (No. 84-1054)	6

TABLE OF AUTHORITIES—(Continued)

Cases:	Page
<i>Quern v. Jordan</i> , 440 U.S. 332 (1979)	14
<i>Scripps-Howard Radio, Inc. v. FCC</i> , 316 U.S. 4 (1942)	15, 17
<i>SEC v. Chenery Corp.</i> , 332 U.S. 194 (1947)	22
<i>Shaw v. Delta Air Lines, Inc.</i> , 463 U.S. 85 (1983)	9
<i>Sims v. United States</i> , 359 U.S. 108 (1959)	15
<i>South Central Bell Tel. Co. v. Kentucky Public Service Comm'n</i> , Civ. No. 85-02 (E.D. Ky. 1985)	33
<i>South Central Bell Tel. Co. v. Louisiana Public Service Comm'n</i> , 570 F. Supp. 227 (M.D. La. 1983), <i>aff'd</i> , 744 F.2d 1107 (5th Cir. 1984), <i>appeal filed</i> , 53 U.S.L.W. 3449 (U.S. Nov. 30, 1984) (No. 84-870)	32
<i>South Central Bell Tel. Co. v. Louisiana Public Service Comm'n</i> , 744 F.2d 1107 (5th Cir. 1984), <i>appeal filed</i> , 53 U.S.L.W. 3449 (U.S. Nov. 30, 1984) (No. 84-870) ..	9, 25, 28, 32
<i>Southwestern Bell Tel. Co. v. Arkansas Public Service Comm'n</i> , 738 F.2d 901 (8th Cir. 1984), <i>petition for cert. filed</i> , 53 U.S.L.W. 3290 (U.S. Sept. 26, 1984) (No. 84-483)	9, 21
<i>Southwestern Bell Tel. Co. v. State Corp. Comm'n</i> , No. 83-4090 (D. Kan. Apr. 8, 1983)	9
<i>Springfield Television, Inc. v. City of Springfield</i> , 428 F.2d 1375 (8th Cir. 1970)	9
<i>Straus Communications, Inc. v. FCC</i> , 530 F.2d 1001 (D.C. Cir. 1976)	24
<i>Transamerica Mortgage Advisors, Inc. v. Lewis</i> , 444 U.S. 11 (1979)	18
<i>United States v. California</i> , 297 U.S. 175 (1936)	15, 17

TABLE OF AUTHORITIES—(Continued)

Cases:	Page
<i>United States v. City of Jackson</i> , 318 F.2d 1 (5th Cir. 1963)	23
<i>United States v. Southwestern Cable Co.</i> , 392 U.S. 157 (1968)	23
<i>United States v. Storer Broadcasting Co.</i> , 351 U.S. 192 (1956)	24
<i>Virginia State Corp. Comm'n v. FCC</i> , 737 F.2d 388 (4th Cir. 1984), <i>cert. granted sub nom. California v. FCC</i> , 105 S. Ct. 3497 (1985) (No. 84-889)	6, 8
<i>Wisconsin Bell, Inc. v. Public Service Comm'n of Wisconsin</i> , Civ. No. 84-C-4 (E.D. Wis. Nov. 13, 1984), <i>appeal pending</i> , No. 84-3110 (7th Cir.)	9
Administrative Orders and Rulings:	
<i>Amendment of Part 31</i> , 89 F.C.C.2d 1094 (1982)	5
<i>Amendment of Part 31</i> , CC Docket No. 79-105, F.C.C. 83-349 (July 22, 1983)	5
<i>Amendment of Part 31, Uniform System of Accounts, etc.</i> , 92 F.C.C.2d 864 (1983)	passim
<i>American Tel. & Tel. Co.</i> , 88 F.C.C.2d 1223 (1982)	3
<i>American Tel. & Tel. Co.</i> , 92 F.C.C.2d 693 (1982)	3, 20
<i>The Chesapeake and Potomac Tel. Co.</i> , 90 F.C.C.2d 964 (1982)	3
<i>In the Matter of the Application of the Chesapeake and Potomac Tel. Co. of Maryland for Authority to Increase and Restructure Its Schedule of Rates and Charges</i> , Case No. 7661 (Feb. 18, 1983)	7
<i>Property Depreciation</i> , 83 F.C.C.2d 267 (1980), <i>recon. denied</i> , 87 F.C.C.2d 916 (1981)	4

TABLE OF AUTHORITIES—(Continued)

Statutes and Legislative Materials:	Page
5 U.S.C. § 551(6).....	22
28 U.S.C. § 1331.....	7, 9, 18
§ 1337.....	7, 9
§ 1342.....	18
47 U.S.C. § 151.....	2
§ 152.....	2
§ 152(a).....	16
§ 153.....	13, 15
§ 153(i).....	10, 14
§ 154(i).....	23
§ 208.....	15
§ 220.....	2, 3
§ 220(b).....	2, 3, 4
§ 220(h).....	3
§ 220(i).....	2
§ 221(a).....	16
§ 221(c).....	16
§ 301.....	17
§ 401(a).....	12, 26, 29
§ 401(b).....	<i>passim</i>
§ 402(a).....	<i>passim</i>
§ 405.....	17
§ 501.....	30
§ 502.....	22, 30
49 U.S.C. § 16 (12).....	23
48 Stat. 1064 (1934).....	25
Communications Act Amendments Act of 1952, Pub. L. No. 82-554.....	25
H.R. Rep. No. 1850, 73d Cong., 2d Sess. (1934).....	23
H.R. Rep. No. 1750, 82d Cong., 2d Sess. (1952).....	25
S. Rep. No. 781, 73d Cong., 2d Sess. (1934).....	25

TABLE OF AUTHORITIES—(Continued)

Treatises and Other Materials:	Page
B. Schwartz, <i>Administrative Law</i> § 4.1 (2d ed. 1984)	22
<i>Webster's New World Dictionary</i> (2d ed. 1980)	19
C. Wright, <i>The Law of the Federal Courts</i> (4th ed. 1983)	14
Wright, Miller, Cooper and Gressman, 16 <i>Federal Practice and Procedure</i> § 4023 (1977)	18
Memorandum of Federal Communications Commission as Amicus Curiae in Support of Petition for Rehearing (July 27, 1984), <i>New England Tel. & Tel. Co. v. Public Utilities Comm'n of Maine</i> , 742 F.2d 1 (1st Cir. 1984)	28, 32

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BRIEF FOR THE RESPONDENT

COUNTER-STATEMENT OF THE CASE

This case involves a federal court injunction against the Maryland Public Service Commission's (hereinafter "Maryland PSC") undenied defiance of a series of Federal Communications Commission ("FCC") orders. In those orders the FCC (i) prescribed depreciation rates and methods for The Chesapeake and Potomac Telephone Company of Maryland's¹ (hereinafter

1. The parent of C&P, and its affiliates with publicly traded securities, were listed in note 1 of C&P's March 27, 1985 brief in opposition to the petition for a writ of certiorari in this case.

"C&P") telephone plant used to provide both interstate and intrastate services, and (ii) directed that all state utility commissions not depart from those depreciation rates and methods in setting charges for intrastate telephone services. The Maryland PSC did not seek appellate review of any of those orders. Instead, it simply refused to comply with those orders, even though it participated in the FCC proceedings in which the depreciation rates for C&P were set, and was served with a copy of the FCC ruling directing that the state commissions apply the FCC-prescribed depreciation rates in setting intrastate telephone charges.

The Maryland PSC now attempts to avoid enforcement of these orders by a strained construction of the statute authorizing enforcement. It goes so far as to argue that the orders cannot be enforced because its individual members are not "persons." It also argues that the statutory authority to enforce "*any* order" somehow does not include imperative and self-executing rulemaking orders served upon the violator by the FCC. Such arguments are plainly baseless and should not be permitted to excuse the Maryland PSC's defiance of a lawful FCC order.

The Communications Act Directs the FCC To Prescribe C&P's Depreciation Rates

C&P is a communications carrier which provides both interstate and intrastate service. As such, C&P is subject to federal regulation by the FCC under the Communications Act of 1934, 47 U.S.C. §§151 *et seq.* The Maryland PSC retains the authority to set the charges for C&P's intrastate telephone services, but this authority must be exercised within the federal regulatory framework established by the Communications Act. See 47 U.S.C. §§151, 152, 220.

Section 220(b) of the Communications Act requires the FCC to "prescribe" depreciation rates for C&P and prohibits C&P from departing in any manner from the FCC-prescribed depreciation rates. Before the FCC prescribes such depreciation rates for a carrier, it is required by Section 220(i) to give interested

state regulatory commissions notice and an opportunity to comment. Finally, Section 220(h) permits the FCC, if "it deems such action consistent with the public interest," to exempt C&P from depreciation rates prescribed under Section 220(b) in favor of state commission regulation of these matters. See 47 U.S.C. §220.

The FCC Has Prescribed Depreciation Rates for C&P

Acting pursuant to Section 220(b), the FCC prescribed depreciation rates for various classes of C&P's property in three separate orders (hereinafter the "Prescription Orders").² The Maryland PSC participated in the proceedings leading to each of these orders and voiced its opposition to the rates ultimately prescribed for C&P by the FCC.³

In each of the proceedings the question of whether the FCC's prescriptions would be binding for intrastate ratemaking purposes was considered.⁴ In the first two of the Prescription Orders, the FCC indicated that the preemption issue would be dealt with in a separate and then pending proceeding. In the last of the Prescription Orders, the FCC announced that "[w]e have today ruled that such depreciation orders are binding at both the federal and state levels," *American Tel. & Tel. Co.*, *supra*, 92 F.C.C.2d at 700, and referenced its order adopted the same day

2. *American Tel. & Tel. Co.*, 88 F.C.C.2d 1223, 1252 (1982) (FCC prescribes remaining life depreciation rates for C&P's existing telephone plant); *The Chesapeake and Potomac Tel. Co.*, 90 F.C.C.2d 964, 976 (1982) (FCC prescribes equal life group depreciation rates for C&P's new outside plant); *American Tel. & Tel. Co.*, 92 F.C.C.2d 693 (1982) (FCC prescribes equal life group depreciation rates for C&P's new central office equipment).

3. *American Tel. & Tel. Co.*, *supra*, 88 F.C.C.2d at 1232; *The Chesapeake and Potomac Tel. Co.*, *supra*, 90 F.C.C.2d at 968; *American Tel. & Tel. Co.*, *supra*, 92 F.C.C.2d at 698.

4. *American Tel. & Tel. Co.*, *supra*, 88 F.C.C.2d at 1237; *The Chesapeake and Potomac Tel. Co.*, *supra*, 90 F.C.C.2d at 971-72; *American Tel. & Tel. Co.*, *supra*, 92 F.C.C.2d at 700.

in the separate proceeding, *Amendment of Part 31, Uniform System of Accounts, etc.*, 92 F.C.C.2d 864 (1983) (hereinafter the "Preemption Order").

Although it was entitled to do so under Section 402(a) of the Communications Act,⁵ the Maryland PSC, which had participated in each of the lengthy proceedings leading to adoption of the Prescription Orders, did not seek review in any of the United States Courts of Appeals of any of those orders.⁶

The FCC Preempted Contrary State Action

The FCC, in its comprehensive Preemption Order, concluded that where it prescribes depreciation rates pursuant to Section 220(b), state commissions are "precluded from departing" from those depreciation rates in setting intrastate charges for telephone services. (Joint Appendix at 40.)⁷ This conclusion was based on a broad concern that the unwillingness of some state commissions to recognize FCC-prescribed depreciation rates was seriously undermining federal communications policy.⁸

5. Section 402(a) provides as follows:

"Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28." 47 U.S.C. §402(a).

6. The actual prescription of C&P's depreciation rates was preceded by an FCC proceeding instituted in 1973 which examined and resolved, with the active participation of the Maryland PSC and other state commissions, the appropriate methods to be used to prescribe depreciation rates. The FCC depreciation methods were intended to account for "the impact of new technology and the transition from a monopoly to a competitive environment." *Property Depreciation*, 83 F.C.C.2d 267, 290 (1980), *recon. denied*, 87 F.C.C.2d 916 (1981).

7. References to pages of the Joint Appendix hereinafter are indicated by "JA at ____."

8. Legally, the Preemption Order rested on two independent grounds: first, that there was an automatic preemptive effect of depreciation schedules under the express terms of Section 220(b) of the Communications Act; and, second, that an exercise of the FCC's discretionary authority to preempt was

The FCC directed that the Preemption Order be published in the *Federal Register* and individually "served on each state commission." (JA at 41.) It is not disputed that the Preemption Order was served on the Maryland PSC.

The FCC subsequently denied requests of the state commissions for a stay of the Preemption Order. In doing so, the FCC underscored the need for immediate compliance with the Preemption Order by the state commissions in the execution of their rate-setting functions:

"The grant of a stay would interfere with our competitive policies. If a stay were to be granted, the capital recovery we found essential to the development of an efficiently functioning competitive marketplace would be halted. Moreover, there is no way that the carriers can retroactively recover the lost opportunity to recover the capital that would have been recovered in the absence of a stay if our decision is upheld on appeal." *Amendment of Part 31*, CC Docket No. 79-105, F.C.C. 83-349, ¶ 7 (July 22, 1983) (hereinafter the "*Denial of Stay*").

Moreover, the FCC did not deny the stay motion in a vacuum: it stated its awareness that some of the state commissions, including the Maryland PSC, were openly refusing to obey the Preemption Order and it noted with approval decisions of federal district courts enjoining such actions. *Denial of Stay, supra*, at ¶¶ 3, 9.

The Preemption Order resulted from proceedings conducted on both the FCC's rulemaking and adjudicatory dockets. The proceeding on the rulemaking docket stemmed from a request by the American Telephone and Telegraph Company for reconsideration of a prior FCC decision concerning the preemptive effect of the FCC's depreciation prescriptions. *Amendment of Part 31*, 89 F.C.C.2d 1094 (1982). The proceeding on the

required in order to insure the implementation of federal policy under the doctrine articulated in *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) and *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). (JA at 40.)

adjudicatory docket stemmed from a request by the General Telephone Company of Ohio that the FCC remedy the Public Utilities Commission of Ohio's refusal to follow FCC-prescribed depreciation rates. (JA at 18-19.) In its consolidated consideration of the two matters, the FCC received comments from numerous state regulatory commissions and from the National Association of Regulatory Utility Commissioners, of which the Maryland PSC is a member. The Maryland PSC did not appear directly in that proceeding.

On review pursuant to Section 402(a) of the Communications Act, the United States Court of Appeals for the Fourth Circuit in *Virginia State Corporation Commission v. FCC*, 737 F.2d 388 (4th Cir. 1984), upheld the Preemption Order as "a valid and complete preemption of state regulation regarding interstate and intrastate depreciation rates and methods for the specified telephone equipment." 748 F.2d at 880. The correctness of that decision is now before this Court in *California v. FCC*, cert. granted, 105 S. Ct. 3497 (1985) (No. 84-889), and several companion cases.⁹

The Maryland PSC Ignored the FCC's Order and Used Different Depreciation Rates

In a general ratemaking proceeding relating to C&P, the Maryland PSC on February 18, 1983 issued an order in which it expressly refused to comply with the FCC's Preemption Order, and sought to apply depreciation rates and methods for intrastate service different from those prescribed by the FCC in the Prescription Orders. (JA at 50.) The stated reason for this action was that the FCC's preemption determination was simply wrong.¹⁰

9. These are *Louisiana Public Service Comm'n v. FCC*, 737 F.2d 388 (4th Cir. 1984), appeal filed, 105 S. Ct. 3496 (1985) (No. 84-871) (jurisdictional finding postponed to hearing of case on the merits); *Public Utilities Comm'n of Ohio v. FCC*, 737 F.2d 388 (4th Cir. 1984), cert. granted, 105 S. Ct. 3498 (1985) (No. 84-1054); and *Florida Public Service Comm'n v. FCC*, 737 F.2d 388 (4th Cir. 1984), cert. granted, 105 S. Ct. 3498 (1985) (No. 84-1069).

10. The Maryland PSC determined that "the depreciation practices established by the FCC in no way limit this Commission's authority to independently determine the appropriate level of depreciation expense to be reflected

The District Court Granted C&P's Motion for a Preliminary Injunction

C&P then initiated this action in the United States District Court for the District of Maryland to enjoin the Maryland PSC and each of its individual members from prohibiting C&P from collecting \$16.1 million (or \$44,000 per day) in charges — an uncontested sum — that reflected the revenue difference between the FCC-mandated depreciation rates and those ordered by the Maryland PSC. (JA at 134.) Jurisdiction was asserted under Section 401(b) of the Communications Act, 47 U.S.C. § 401(b), and under the "federal question" jurisdictional provisions of 28 U.S.C. Sections 1331 and 1337. (JA at 9.) Section 401(b) is a broadly worded statutory provision that authorizes the United States, the FCC, and *any injured party* to bring suit in the federal district courts for the enforcement of "any order of the Commission other than for the payment of money" against "any person" disobeying such an order, provided only that the order is "regularly made and duly served."¹¹

After determining that jurisdiction existed under Section 401(b), the district court entered a preliminary injunction requiring the Maryland PSC to permit C&P to use the deprecia-

in intrastate rates for telephone service." Order No. 66114, *In the Matter of the Application of the Chesapeake and Potomac Tel. Co. of Maryland for Authority to Increase and Restructure Its Schedule of Rates and Charges*, Case No. 7661, at 18 (Feb. 18, 1983). (JA at 67.)

11. Section 401(b) provides, in full, as follows:

"If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

tion rates and methods prescribed by the FCC.¹² The court rejected the notion that the Maryland PSC and its members were not "persons" within the meaning of Section 401(b). 560 F. Supp. at 846-47.¹³ The court also found that C&P was sustaining irreparable injury because state law precluded C&P from any subsequent recovery of the intervening shortfall in revenues that resulted from the depreciation rates dictated by the Maryland PSC. *Id.* at 848. In contrast to this injury, the court noted that C&P's application of the FCC-prescribed depreciation rates and methods would only result in roughly a "penny per day" in increased charges to C&P's customers. *Id.* (See JA at 145.)

The Fourth Circuit Upheld the District Court's Decision

The Maryland PSC appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court's decision.¹⁴ The court of appeals first noted its previous affirmance of the validity of the FCC's Preemption Order in *Virginia State Corporation Commission v. FCC*, *supra*. The court went on to reject the argument that the Maryland PSC is not a "person" subject to suit under Section 401(b), noting both (i) that the individual officials comprising the Maryland PSC were named as defendants, and (ii) that the Maryland PSC's position "would undermine the Federal Communications Act by rendering PSC and other communications 'entities' immune from enforcement actions by the FCC under Section 401(b)." 748 F.2d at 881. The court of appeals also rejected an argument, first made on appeal, that the Preemption Order was not an "order" within the meaning of Section 401(b)." *Id.*¹⁵

12. *The Chesapeake and Potomac Tel. Co. of Maryland v. Public Service Comm'n of Maryland*, 560 F. Supp. 844, 849 (D. Md. 1983).

13. Before the district court, the Maryland PSC did not even advance the argument now presented that the Preemption Order is not an "order" enforceable under Section 401(b).

14. *The Chesapeake and Potomac Tel. Co. of Maryland v. Public Service Comm'n of Maryland*, 748 F.2d 879 (4th Cir. 1984).

15. Because the district court and court of appeals determined that jurisdiction existed under Section 401(b) of the Communications Act, neither

The Fifth Circuit and the Eighth Circuit, like the Fourth Circuit in this case, have also held that the federal district courts have jurisdiction, pursuant to Section 401(b), to enjoin state commissions' refusals to follow the Preemption Order. *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 744 F.2d 1107 (5th Cir. 1984), *appeal filed*, 53 U.S.L.W. 3449 (U.S. Nov. 30, 1984) (No. 84-870); *Southwestern Bell Telephone Co. v. Arkansas Public Service Commission*, 738 F.2d 901 (8th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3290 (U.S. Sept. 26, 1984) (No. 84-483).¹⁶ Only the First Circuit has found the Preemption Order not to be enforceable in an action brought under Section 401(b). *New England Telephone and Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1 (1st Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3460 (U.S. Dec. 5, 1984) (No. 84-900). The Court has held in abeyance the requests for review of these decisions.

This Court granted certiorari on June 24, 1985, and directed that oral argument in this case be held in tandem with *California v. FCC* and the companion cases challenging the validity of the Preemption Order.

passed on C&P's claim that jurisdiction existed as well under 28 U.S.C. §§ 1331 and 1337. Under the latter provisions, the courts have exercised jurisdiction to declare unlawful and enjoin state regulation preempted by the FCC. *Brookhaven Cable TV Inc. v. Kelly*, 428 F. Supp. 1216 (N.D.N.Y. 1977), *aff'd*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979); *Springfield Television, Inc. v. City of Springfield*, 428 F.2d 1375 (8th Cir. 1970). See generally *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983).

16. Several district courts have also enforced the Preemption Order under Section 401(b). E.g., *Wisconsin Bell, Inc. v. Public Service Comm'n of Wisconsin*, Civ. No. 84-C-4 (E.D. Wis. Nov. 13, 1984), *appeal pending*, No. 84-3110 (7th Cir.); *Northwestern Bell Tel. Co. v. Iowa State Commerce Comm'n*, No. 83-688-A (S.D. Iowa Sept. 27, 1984); *Mountain States Tel. & Tel. Co. v. Department of Public Service Regulation*, 588 F. Supp. 5, 9 (D. Mont. 1983); *Southwestern Bell Tel. Co. v. State Corp. Comm'n*, No. 83-4090 (D. Kan. Apr. 8, 1983), *appeal pending*, No. 84-2295 (10th Cir.); *Pacific N.W. Bell Tel. Co. v. Washington Utility and Transportation Comm'n*, 565 F. Supp. 17, 21 (W.D. Wash. 1983), *appeal pending*, No. 83-3746 (9th Cir.).

SUMMARY OF ARGUMENT

In providing in Section 401(b) for the enforcement by private parties of "any order" of the FCC in the federal district courts against "any person" disobeying the order, Congress plainly contemplated that parties injured by noncompliance with FCC orders that were "duly served" upon any violator should be entitled to seek relief themselves in the federal district courts. This fundamental enforcement policy is ignored entirely by the Maryland PSC and supporting state commission *amici curiae* (hereinafter "supporting *amici curiae*"). But it is the crux of Section 401(b) and should be dispositive of this case: the openly acknowledged noncompliance of the Maryland PSC and its individual members with a clear, imperative, and immediately effective FCC ruling intended to implement federal communications policy (the Preemption Order) was irreparably injuring C&P, and the federal court properly granted C&P relief to put an end to that injury and to require adherence to federal law as determined and implemented by the FCC.

The constricted meanings urged by the Maryland PSC of the phrases "any person" and "any order" as they appear in Section 401(b) have no merit:

1. The court of appeals correctly concluded that the individual members of the Maryland PSC were "persons" within the meaning of the Communications Act, and therefore subject to suit under Section 401(b). Section 3(i) of the Act, 47 U.S.C. § 153(i), clearly defines the term "person" as including such individuals, and the naming of state officials as defendants in injunction actions such as this is consistent with longstanding practice under the decisions of the Court.

The court of appeals was also correct in determining, in the alternative, that "state commissions" are "persons" within the meaning of the Act. If "state commissions" (or their individual members) are not regarded as "persons" under the Communications Act, then there would be no means for anyone — including the FCC — to bring suit in the federal courts to enjoin the states from intruding into areas clearly reserved under the Communications Act for federal regulation. It is inconceivable

that Congress, *sub silentio*, intended to withhold from the federal courts in this manner all jurisdiction over state action inconsistent with a comprehensive federal statute regulating the huge telecommunications industry. The Maryland PSC's contrary contentions are completely unsupported.

2. The Preemption Order was served upon the Maryland PSC and was intended by the FCC to be immediately binding without further agency action. Under these circumstances, the Preemption Order is in both name and substance an "order" within the meaning of Section 401(b). This conclusion is supported by the decisions of this Court (i) indicating that the FCC has broad authority to issue such "orders" as are necessary to carry out its responsibilities, and (ii) construing the term "order" in Section 402(a) of the Communications Act as including self-executing FCC regulations.

The FCC has spoken in favor of the private enforcement of the Preemption Order under Section 401(b), and as the agency responsible for administering the Communications Act, its views are entitled to great weight. Contrary to the Maryland PSC's contentions, the FCC's role in implementing federal communications policy is *enhanced* by expeditious private enforcement of violations of imperative, immediately effective and unambiguous rulings such as the Preemption Order which have been served on the violator by the FCC. Moreover, the federal district courts are fully capable of enforcing clear-cut FCC rulings such as the Preemption Order, as Congress intended in Section 401(b), and the district court below properly did so.

ARGUMENT

I. THE MARYLAND PSC AND ITS MEMBERS ARE "PERSONS" SUBJECT TO THE JURISDICTION OF THE FEDERAL COURTS UNDER SECTION 401(b)

The court of appeals correctly determined that the individual members of the Maryland PSC, and the Maryland PSC itself, are "persons" subject to suit under Section 401(b). These alternative holdings are both consistent with the language of the statute and its legislative purpose.

A. Jurisdiction Existed Under Section 401(b) Because the Individual Members of the Maryland PSC Were Named as Defendants and Are Indisputably "Persons"

Section 401(b) of the Communications Act gives the federal district courts jurisdiction over suits to enforce an FCC order against "any person" disobeying such an order. Like Section 401(b), the other enforcement provisions of the Communications Act provide for proceedings against "persons." For instance, under Section 401(a) of the Communications Act, 47 U.S.C. § 401(a),¹⁷ the federal district courts have jurisdiction over suits brought by the FCC against "persons" for violations of the Communications Act.

The term "person" is defined in Section 3 of the Communications Act as follows:

"For the purpose of this Act, unless the context otherwise requires —

* * *

17. Section 401(a) provides as follows:

"The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of *any of the provisions of this chapter* by *any person*, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter." 47 U.S.C. § 401(a) (emphasis added).

(i) 'Person' includes an *individual*, partnership, association, joint-stock company, trust, or corporation.' " 47 U.S.C. §153 (emphasis added).

The individual members of the Maryland PSC were named as defendants in C&P's complaint (JA at 9-10), and were enjoined by the district court from disobeying the Preemption Order. (Petition for Writ of Certiorari at 12a.) They are clearly "individuals." By the direct definitional language of Section 3(i) of the Communications Act, and as the court of appeals held, the commission members — being individuals — are thus "person" and subject to the jurisdiction of the federal courts in Section 401(b) action. 748 F.2d at 881.

This "plain meaning" reading of the Communications Act is completely dispositive of the Maryland PSC's contention that jurisdiction did not exist for want of a "person." As the Court recently held, "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.'" *Garcia v. United States*, 105 S. Ct. 479, 483 (1984) (citations omitted).¹⁸ There are no such "rare and exceptional circumstances" here, as there is no discernible legislative history indicating that the term "person" should not be given its natural meaning — and the meaning expressly set forth in Section 3(i) — with respect to individual members of a state commission. (See pp. 16-19, *infra*.)

The court of appeals' holding that the individual members of the Maryland PSC are "persons" subject to suit under Section 401(b) fully accords with the longstanding practice of naming state officials as defendants in injunction actions seeking compliance by state agencies with federal law. This practice grew out of the Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), holding that where the Eleventh Amendment of the United States Constitution would bar an action against a state, federal courts are authorized — through prospective injunctions — to require individual officers acting in their official capacities to

18. See *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

comply with federal law.¹⁹ The *Ex parte Young* doctrine was recently reaffirmed by the Court's unanimous decision in *Kentucky v. Graham*, 105 S. Ct. 3099 (1985), where the Court stated that "[i]n an injunctive or declaratory action grounded on federal law, the State's [Eleventh Amendment] immunity *can* be overcome by naming state officials as defendants." 105 S. Ct. at 3107 n.18 (emphasis in original).²⁰

Indeed, to the extent that the language of the Communications Act is not as explicit as it might be in expressly making state commissions themselves subject to enforcement proceedings, it is likely because Congress understood that the usual and proper means of compelling their compliance with federal law would be through injunction suits against individual state officials. At the time the Communications Act was enacted in 1934, this practice was already over twenty-five years old.

B. Congress Did Not Intend in the Communications Act To Immunize State Commissions from Enforcement Proceedings in the Federal Courts

The court of appeals below concluded that the Maryland PSC is also a "person" within the meaning of Section 401(b) because "[a] contrary interpretation would undermine the Federal Communications Act by rendering PSC and other communications 'entities' immune from enforcement actions by the FCC under Section 401(b)." 748 F.2d at 881. This alternative holding, like the holding that the individual members of the Maryland PSC are "persons," accords with the language of the Communications Act as well as its legislative purpose.

In the first instance, this holding that the term "person" includes a "state commission" is in no way inconsistent with the plain language of the statute. Section 3(i) of the Act, by saying

19. See, e.g., *Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Edelman v. Jordan*, 415 U.S. 651, 664 (1974); C. Wright, *The Law of Federal Courts* 292 (4th ed. 1983).

20. In recognition of the *Ex parte Young* doctrine, the Maryland PSC has not argued at any stage of this case that its individual members are not subject to suit in federal court by virtue of the Eleventh Amendment, and that issue is therefore not presented in this case.

what the term "person" "includes," makes the provision expressly illustrative rather than exhaustive.²¹ The Maryland PSC concedes as much. (Brief for the Petitioner at 12-13.)

In fact, Congress provided that the definitions in the Act only apply "unless the context otherwise requires." 47 U.S.C. § 153. In addition, this Court has specifically concluded on several occasions that, for lack of compelling reasons otherwise, the term "person" in a federal statute should be construed as including states and state agencies even though the statute does not specifically reference those entities.²² As the Court has explained:

"Whether the word 'person' or 'corporation' includes a State or the United States depends upon its legislative environment. . . . '[T]here is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent by the use of the term, to bring state or nation within the scope of the law.'" *Georgia v. Evans*, 316 U.S. 159, 161 (1942) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604-05 (1941)).²³

21. See generally *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle").

22. See, e.g., *Sims v. United States*, 359 U.S. 108, 113 (1959) (construing Internal Revenue Code); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 452 (1945) (construing Clayton Act); *Georgia v. Evans*, 316 U.S. 159, 160-63 (1942) (construing Sherman Act); *United States v. California*, 297 U.S. 175, 186 (1936) (construing Safety Appliance Act); *Ohio v. Helvering*, 292 U.S. 360 (1934) (construing 26 U.S.C. § 205).

23. The Maryland PSC's argument that "Congress clearly would have expressly included 'state commission' in the definition of 'person' if it intended the latter to encompass the former" (Brief for the Petitioner at 14), is pure conjecture. See *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11 (1942) ("The search for significance in the silence of Congress is too often the pursuit of a mirage."). Further, although Congress used both "person" and "state commission" in Section 208 of the Communications Act, 47 U.S.C. § 208, as the Maryland PSC points out, Congress also referred to "State commission[s]" . . .

All of the factors cited by the Court weigh in favor of the treatment of "state commissions" — and, of course, their individual members as well — as "persons" for purposes of Section 401(b). In enacting the Communications Act, Congress intended to establish comprehensive federal regulation of interstate communication.²⁴ In furtherance of the Act's comprehensive federal regulatory scheme, Congress provided in Section 401(b) for the enforcement of FCC orders against "any person" in federal district court. There is *nothing* in the Communications Act or its legislative history — and for that reason nothing is cited by the Maryland PSC — indicating that state commissions or their individual members were intended to be immune from such suits when they ignore the dictates of a federal regulatory determination, as the Maryland PSC has done here.²⁵

The correctness of the court of appeals' determination that "state commissions" and their individual members are "persons" subject to federal court jurisdiction under Section 401(b) can also be demonstrated by considering the startling implications of the Maryland PSC's contrary contention. Because Section 401(b) and the other enforcement provisions of the Communications

NOTES (Continued)

and to such *other* persons" elsewhere in the Act, thereby suggesting that "state commission" could be subsumed within the term "person." See 47 U.S.C. §§ 221(a), (c) (emphasis added). In the final analysis, however, these semantic adventures in statutory construction lead to ambiguous conclusions, and carry little weight.

24. The FCC was "given 'broad responsibilities' to regulate all aspects of interstate communication by wire or radio by virtue of § 2(a) of the Communications Act of 1934, 47 U.S.C. § 152(a)," *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694, 2701 (1984), and the FCC's authority extends to all regulatory actions necessary to "ensure the achievement of the Commission's statutory responsibilities." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979).

25. The proper course for a state commission seeking redress from the effect of the Preemption Order is direct review under Section 402(a) of the Communications Act rather than through open defiance. See *FCC v. ITT World Communications, Inc.*, 104 S. Ct. 1936, 1939 (1984). Whether the FCC improperly intruded into an area reserved for state regulatory action is, of course, before the Court in *California v. FCC*, *supra*. If the Court should find the Preemption Order to be an improper exercise of federal regulation, this case should be remanded to the district court for dismissal.

Act all provide for enforcement actions against "persons" (see p. 12, *supra*), the Maryland PSC's argument that neither it nor its members are "persons," if accepted, would immunize all state commissions and members thereof from suit by both the FCC and private parties in federal court respecting violations of express FCC orders as well as violations of the Communications Act itself. Under the Maryland PSC's theory, recourse against the state commission and its members for violation of the federal statute — even on the part of the United States — could be had *only* in state court.²⁶ (Brief for the Petitioner at 8.)

It is inconceivable, however, that Congress intended, without expressly saying so, to divest the federal courts of jurisdiction over such matters. As noted above, the Communications Act is a comprehensive federal statute regulating one of the nation's largest industries. Its basic purpose "was to protect the public interest in communications," *Scripps-Howard Radio, supra*, 316 U.S. at 14, by formulating "a unified and comprehensive regulatory system for the industry." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). Congress' desire to achieve a unified communications system is "as capable of being obstructed by state as by individual action," *United States v. California, supra*, 297 U.S. at 186 (construing the Safety Appliance Act), and there is no reason why state commissions and their members alone should not be subject to suit in federal court if they take action proscribed by FCC orders or the Communications Act.²⁷

Indeed, the goal of a unified communications system would be greatly hindered if the FCC and other parties had to rely exclusively on the state courts — with their varying procedural requirements, remedial measures, and jurisdictional limitations

26. There would also be other inexplicable results if state agencies were not "persons" within the meaning of the Communications Act. For instance, state agencies would not be "persons" able to obtain radio licenses or seek reconsideration of FCC decisions. 47 U.S.C. §§ 301, 405.

27. As Chief Justice Burger wrote, when he was on the District of Columbia Circuit, "the [FCC's] regulatory and enforcement powers should not be artificially fragmented or compartmentalized when the result would be to frustrate a comprehensive, pervasive regulatory scheme." *General Tel. Co. of California v. FCC*, 413 F.2d 390, 402 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

on action against state entities — for enforcement of FCC orders and the Communications Act.²⁸ The hodge-podge that would result could not be what Congress intended.

Significantly, the Court has previously rejected the contention that federal rights can be raised only in state court absent “some indication that Congress in fact wished to limit the litigation of a federal right to the state courts.”²⁹ *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 n.8 (1979). But as noted above, there is no hint whatever in the Communications Act or its legislative history that FCC orders directing state commissions to cease encroachment upon areas of exclusive federal authority should not be enforceable by *anyone* in the federal courts.

Because the construction of the term “person” advanced by the Maryland PSC would divest the federal courts of jurisdiction over the most blatant incursions by state commissions and their members on areas indisputably reserved for federal regulation, it is no answer for the Maryland PSC to urge that the Preemption Order infringes on an area of regulation properly reserved to the states. (Brief for the Petitioner at 19-20.)³⁰ The Maryland PSC’s emphasis on the alleged invalidity of the Preemption Order is totally irrelevant to the construction of the term “person,” which

28. See *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (state limitations on subject-matter jurisdiction apply in state court suit to enforce federal law); 16 Wright, Miller, Cooper and Gressman, *Federal Practice and Procedure* § 4023 (1977) (applicability of state procedure when federal issues are presented in state court).

29. The federal courts generally have jurisdiction over any civil action “arising under the . . . laws . . . of the United States.” 28 U.S.C. § 1331.

30. Nor is there any merit to the Maryland PSC’s suggestion that “abstention” by the federal courts is required in this case. (Brief for the Petitioner at 20.) It is well-settled that abstention by the federal courts is inappropriate where, as here, state law is preempted. In such circumstances, the basic premise of abstention — avoidance of federal intrusion into essentially local matters — is absent. *E.g.*, *Baggett v. Department of Professional Regulation*, 717 F.2d 521, 524 (11th Cir. 1983). Similarly, the Johnson Act by its terms does not prevent the federal courts from enjoining state regulatory actions where, as here, there is a specific statutory basis for federal jurisdiction (Section 401(b)) and where, as here, the state action is interfering with federal regulation of interstate commerce. 28 U.S.C. § 1342.

presents only the jurisdictional question whether state commissions or their individual members are subject to suit in federal court under Section 401(b).

In sum, the language of the Communications Act, as well as its legislative history, is utterly devoid of any support for the Maryland PSC’s contention that “state commissions” or their individual members are not “persons” subject to federal court jurisdiction under Section 401(b). To the contrary, the achievement of the Act’s objectives is furthered by federal district court jurisdiction, under Section 401(b), over violations of FCC orders by state commissions as well as others.

II. THE PREEMPTION ORDER IS AN “ORDER” ENFORCEABLE UNDER SECTION 401(b)

Section 401(b) of the Communications Act provides, in sweeping terms, that “any order” of the FCC other than an order for the payment of money may be enforced in federal district court by the FCC, the United States, or by any party injured by noncompliance with the “order.” Inasmuch as the Preemption Order required specific action by the Maryland PSC and others, was served upon the Maryland PSC, and was intended to be immediately binding without further agency action, the Preemption Order is in substance as well as in name an “order” and is therefore enforceable under Section 401(b). This conclusion is confirmed by precedent of this Court, the federal interest in the sound enforcement of the Communications Act, and the views of the FCC.

A. The Preemption Order Stated Specific Requirements To Be Followed by the Maryland PSC

In construing the term “order” as it is found in Section 401(b) — as was the case with the term “person” — the Court must be guided first by the term’s plain meaning. *Garcia v. United States*, *supra*. The dictionary definition of “order” is “a command, direction, or instruction, usually backed by authority.” *Webster’s New World Dictionary* 1000 (2d ed. 1980).

The Preemption Order was plainly an "order" within this meaning in that the FCC, exercising its federal authority, required therein that the state commissions, including the Maryland PSC, apply the FCC-prescribed depreciation rates and methods in determining telephone carriers' charges for intrastate service.

The imperative character of the Preemption Order, and the FCC's intention to require immediate compliance by the Maryland PSC, is evident from several factors:

First, the Prescription Order proceedings — in which the Maryland PSC participated — established depreciation rates and methods that were to apply to C&P. In the last of the Prescription Orders, the FCC cited the Preemption Order and stated that "[w]e have today ruled that such depreciation orders are binding at both the federal and state levels." *American Tel. & Tel. Co.*, *supra*, 92 F.C.C.2d at 700 (emphasis added). The Maryland PSC was thus no stranger to the Preemption Order; to the contrary, the requirements of the Preemption Order were directed expressly at the Maryland PSC inasmuch as they were specifically referenced in and incorporated into a ratemaking order in proceedings in which the Maryland PSC participated.³¹

Second, in the Preemption Order the FCC stated in no uncertain terms that the state commissions are "precluded from departing" from the FCC-prescribed depreciation rates in setting charges for intrastate telephone service. (JA at 40.)³² This is not the language of a general interpretive statement; it is rather the language of specific command, and was undoubtedly so understood by the Maryland PSC when it decided to defy the Preemption Order. It was, after all, not until the appellate level of this case that the Maryland PSC even advanced the argument

31. These factors indicate that this case could be regarded not only as a suit to enforce the Preemption Order, but also as a suit to enforce C&P's rights under the Prescription Orders. As noted, the FCC directed in the third Prescription Order that the FCC-prescribed depreciation rates and methods were to apply for intrastate purposes as well, and the Maryland PSC participated in the Prescription Order proceedings.

32. The FCC further stated that "this Commission's depreciation policies and rates, including the expensing of inside wiring, preempt inconsistent state depreciation policies and rules." (JA at 40.)

that the Preemption Order was not an "order" under Section 401(b).

Third, the FCC directed that the Preemption Order — expressly denominated by the FCC as a "Memorandum Opinion and Order" (JA at 18) — be served on each state commission. (JA at 41.) It was served on the Maryland PSC.

Fourth, there is nothing in the Preemption Order suggesting any need for further FCC interpretation or action to implement the Order's straightforward and specific requirement that the state commissions apply the FCC-prescribed depreciation rates and methods in setting charges for intrastate service. As the FCC indicated in denying the motion to stay the effectiveness of the Preemption Order (p. 5, *supra*), the FCC intended to require the state commissions to comply *immediately* with the FCC's directive.

Under these circumstances, the Maryland PSC's characterization of the Preemption Order as nothing more than an effort "to provide 'guidance' to state commissions by clarifying the effect of the FCC's depreciation prescriptions" must be rejected. (Brief for the Petitioner at 26.) The context and character of the Preemption Order establish that it was, and was intended by the FCC to be, an imperative and immediately effective order directed to the Maryland PSC and other state commissions.

Significantly, the Preemption Order was properly viewed by the district court as conclusively valid for purposes of C&P's suit under Section 401(b), as the validity of an FCC order can only be reviewed by a court of appeals pursuant to Section 402 of the Communications Act. *FCC v. ITT World Communications*, *supra*, 104 S. Ct. at 1939.³³ The district court therefore was correct in preliminarily enjoining the Maryland PSC and its individual members from disobeying the presumptively-valid

33. Only "regularly made" orders can be enforced under Section 401(b), but as the district court noted, this "refers to procedural regularity because jurisdiction over the issue of the validity of an FCC Order is vested exclusively in the Court of Appeals." 560 F. Supp. at 848. The procedural regularity of the Preemption Order has not been challenged in this case. *Id.* See *Southwestern Bell Tel. Co.*, *supra*, 738 F.2d at 907.

Preemption Order, no matter what the Court's ultimate determination of the validity of the Preemption Order in *California v. FCC*, *supra*. See note 25, *supra*.

B. The Substance of the Preemption Order, and Not the Method by Which It Was Adopted, Demonstrates Its Character as an "Order" Under Section 401(b)

In seeking to justify its disregard of the FCC's Preemption Order, the Maryland PSC argues that only "adjudicatory orders" are enforceable under Section 401(b), and that the Preemption Order is not such an "order" because it was "the product of a rulemaking." (Brief for the Petitioner at 8, 21.) This distinction, which exalts form over substance, finds no support in the language of the statute or the decisions of the Court.

In the first instance, the language of Section 401(b) broadly provides for the enforcement of "any order" other than an order for the payment of money, and does not distinguish in any fashion between (i) "adjudicatory orders" and (ii) "rulemaking orders" having immediate force and commanding specific action.³⁴ It is well-settled that administrative agencies can require or prohibit conduct through either adjudication or rulemaking;³⁵ both types of agency action are commonly referred to as "orders";³⁶ and compliance with adjudicatory and rulemaking "orders" is equally required by law.³⁷

Moreover, the term "order" is not, as the Maryland PSC urges, used narrowly in the Communications Act: Section 4(i)

34. The definition of the term "order" in the Administrative Procedure Act ("APA"), 5 U.S.C. § 551(6), relied upon by the Maryland PSC, has no applicability in construing the same term in the Communications Act, which was enacted twelve years before the APA. In fact, the APA definition is, by its terms, applicable only for the purpose of the APA. In non-APA contexts, the term "order" is used with different meanings. See B. Schwartz, *Administrative Law* § 4.1 (2d ed. 1984).

35. *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947).

36. For example, in *FCC v. ITT World Communications*, *supra*, 104 S. Ct. at 1939, the Court referred to the FCC's denial of a rulemaking petition as a "final FCC order."

37. The willful violation of FCC rules and regulations can result in a severe fine under Section 502 of the Communications Act. 47 U.S.C. § 502.

broadly provides that the FCC may "issue such orders . . . as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Indeed, as the Court has previously stated in holding that the FCC has broad power to issue different types of prohibitory orders under Section 4(i):

"This Court has recognized that 'the administrative process [must] possess sufficient flexibility to adjust itself' to the 'dynamic aspects of radio transmission,' [citation omitted], and that it was precisely for that reason that Congress declined to 'stereotyp[e] the powers of the Commission to specific details' [citation omitted]." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 180 (1968).

This principle belies the Maryland PSC's efforts to read into Section 401(b) an artificial and inflexible distinction between "orders" (i) that are the product of adjudicatory proceedings and (ii) highly specific orders, like the Preemption Order, that were the product (at least in part) of the FCC's rulemaking docket. Since there is also a total absence of legislative history supporting the narrow construction of the term "order" advanced by the Maryland PSC,³⁸ that construction should be rejected under general principles of statutory construction. See *Garcia v. United States*, *supra*.

The character of the Preemption Order as an "order" within the meaning of Section 401(b) is further confirmed by the Court's decision in *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416 (1942). In that case, CBS brought an

38. Section 401(b) was modeled after 49 U.S.C. Section 16(12), a provision of the Interstate Commerce Act. See H.R. Rep. No. 1850, 73d Cong., 2d Sess. 7 (1934). While several cases cited by the Maryland PSC (Brief for the Petitioner at 33-34) have construed Section 16(12) as permitting enforcement only of orders commanding certain individuals to take particular actions, the Preemption Order effectively does just that. Moreover, other courts have enforced general rules and regulations under Section 16(12). See *Pacific Fruit Express Co. v. Akron, Canton & Youngstown R.R.*, 524 F.2d 1025, 1031 (9th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); *United States v. City of Jackson*, 318 F.2d 1, 9 (5th Cir. 1963).

action in district court under Section 402(a) of the Communications Act, seeking judicial review of an FCC regulation that precluded a broadcast station from obtaining a license if the station entered into certain types of contracts with a broadcast network.

In finding that the FCC regulation concerning contracts between radio stations and networks was an "order" within the meaning of Section 402(a), the Court first observed that "it is the *substance* of what the Commission has purported to do and has done which is decisive." 316 U.S. at 416 (emphasis added). With this governing principle, the Court found the regulation to be a reviewable "order" because the regulation was "self-executing" in that compliance by broadcast stations had an immediate practical impact upon the contractual relations between the stations and CBS (the network).³⁹

The Court's holding is also applicable to the Preemption Order and demonstrates that it is an "order" within the meaning of Section 401(b):

— *First*, the Preemption Order is, perhaps even more than the FCC regulation in *CBS*, an agency action with immediate force. (See pp. 20-22, *supra*.) It is indisputably an "order" for purposes of the judicial review it is receiving under Section 402(a), and should be so regarded for purposes of Section 401(b) because there is a "natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

— *Second*, this natural presumption is strongly reinforced by the fact that, at the time of the *CBS* decision,

39. The Court noted that regulations may have the "force of law before their sanctions are invoked as well as after," and held that "[w]hen, as here, [regulations] are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack under the provision of §402(a)" 316 U.S. at 418-19. Numerous FCC regulations and other actions have, subsequent to the *CBS* case, been reviewed as FCC "orders" under Section 402(a). *E.g.*, *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 773 (1978); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Straus Communications, Inc. v. FCC*, 530 F.2d 1001 (D.C. Cir. 1976).

Section 402(a) described procedures to be followed for *enforcement*, as well as judicial review, of FCC orders in the federal courts.⁴⁰ The Court in *CBS* was thus construing a statutory provision involving the enforcement of "any order of the Commission" — the exact same language used in Section 401(b),⁴¹ granting jurisdiction to the federal district courts — and its holding therefore extends directly to an enforcement case such as this.

— *Third*, the same considerations of fairness that were of concern to the Court in *CBS* — *i.e.*, affording aggrieved parties an opportunity to challenge FCC action with an adverse effect on them — are at play here. Substantial unfairness and harm to a party (C&P) can arise through another entity's (the Maryland PSC) noncompliance with an FCC ruling intended to have immediate force and to benefit the first party (C&P), just as in *CBS* harm to the party seeking review (the network) could arise through compliance by others (the stations) with an allegedly improper regulation.⁴² Indeed, to obtain preliminary injunctive relief from the district court under Section 401(b), C&P was required to and

40. Section 402(a) then provided that suits to "enforce, enjoin, set aside, annul, or suspend *any order of the Commission*" (except for certain types of orders made reviewable exclusively in the District of Columbia Circuit by Section 402(b)) shall be brought before a three-judge district court panel in the same manner as provided with respect to the "enforcing or setting aside of the orders of the Interstate Commerce Commission." 48 Stat. 1064, 1093 (1934) (emphasis added). See S. Rep. No. 781, 73d Cong., 2d Sess. 9 (1934). By the Communications Act Amendments of 1952, Pub. L. No. 82-554, Congress amended Section 402(a) to provide for review of "orders" by the courts of appeals instead of by three-judge district court panels. See H.R. Rep. No. 1750, 82d Cong., 2d Sess. 17 (1952); see generally *FCC v. American Broadcasting Co.*, 347 U.S. 284, 289 n.4 (1954). Congress undoubtedly deleted the word "enforce" from the amended version of Section 402(a) because it did not wish FCC orders to be enforceable in the courts of appeals, but rather in the district courts.

41. As it does today, Section 401(b) at the time of the *CBS* decision provided the federal district courts with *jurisdiction* over suits to enforce FCC orders.

42. See *South Central Bell Tel. Co.*, *supra*, 744 F.2d at 1118.

did demonstrate irreparable harm stemming from the Maryland PSC's refusal to obey the Preemption Order. 560 F. Supp. at 848.

— *Fourth*, it is difficult to believe that Congress contemplated that certain agency actions would be reviewable "orders" for purposes of Section 402(a) but not enforceable "orders" for purposes of Section 401(b). Indeed, it is precisely the prospect of enforcement of the Preemption Order that renders it a reviewable FCC "order" under Section 402(a).⁴³

The Court need not determine here whether *all* FCC regulations — no matter how general in their terms and applicability — are enforceable under Section 401(b). Because of the imperative nature of the Preemption Order, as described above, it is only necessary for the Court to follow its *CBS* holding and rule that the term "order" in Section 401(b) includes all FCC directives and rulings that (i) are "regularly made and duly served," as required for enforcement under Section 401(b), and (ii) are "self-executing" in substance in that they are intended to mandate specific action by particular parties without further agency action. As set forth next, this position does not present any of the policy evils conjured up by the Maryland PSC and supporting *amici curiae* in their respective briefs.

43. The enforceability under Section 401(b) of FCC actions taken through the rulemaking docket is also demonstrated by the Court's decision in *Ambassador, Inc. v. United States*, 325 U.S. 317 (1945). In that case, the Court held that the FCC could bring suit under "§401" against hotels for their violation of a tariff regulation that had been filed by a telephone company in compliance with an FCC rulemaking order but that had not been specifically reviewed by the FCC. In citing "§401" in support of its conclusion that "the prosecution of an action to restrain a violation is authorized," 325 U.S. at 325, the Court could only have been referring to Section 401(b). Section 401(a) — the only other portion of Section 401 granting the federal district courts any jurisdiction — only authorizes a district court to enjoin violations of the Communications Act itself and the violation of a tariff regulation is obviously not a violation of any provision of the Act. (See pp. 29-30, *infra*.) If a tariff filed by a telephone company is enforceable under Section 401(b), a formal FCC ruling such as the Preemption Order should certainly be enforceable as well.

C. The Enforcement of the Preemption Order Under Section 401(b) Is Consistent with the Policies of the Communications Act

1. Private Enforcement of the Preemption Order Advances the Federal Interest and Is Necessary To Prevent Irreparable Harm to Regulated Parties

Section 401(b) of the Communications Act provides for the enforcement of FCC "orders" by *private parties* in the *federal district courts*. Congress obviously contemplated by that provision that private parties and the federal district courts would both have a legitimate role to play in implementing federal communications policy by enforcing clear-cut and imperative FCC decisions, such as the Preemption Order. Congress did not require the participation of the FCC in every suit brought by private parties to enforce an FCC "order," nor did it fear that the district courts would be incapable of determining whether violations of the FCC "order" had occurred, or whether the violators complied with the courts' injunctive orders.

In recognition of these principles, the FCC has spoken in favor of the enforcement of the Preemption Order by private parties in Section 401(b) suits, and has specifically taken the position that the Preemption Order is an "order" within the meaning of Section 401(b). In an *amicus curiae* brief submitted to the First Circuit in *New England Telephone, supra*, in support of a petition for rehearing, the FCC said as follows:

"The Commission has broad discretion to use either rulemaking or case-by-case adjudication (or some combination of both) to carry out its responsibility to enforce the Act. It is well within that discretion for it to adopt self-executing rules to implement the Act and then to rely in part on private enforcement actions such as the ones involved in the several depreciation cases. *The very justification for a private enforcement statute such as Section 401(b) is that the agency may not have the resources to police every violation*

*of its orders and that aggrieved private parties with something at stake can help it with its job."*⁴⁴

As the agency charged with administering the Communications Act, the FCC's views are entitled to great weight.⁴⁵ Moreover, the FCC's own position that private enforcement of the Preemption Order promotes, rather than impinges, its role in implementing federal communications policy obviously has far greater credibility than the contrary claims of the Maryland PSC and supporting *amici curiae*. It is ironic, to say the least, that those parties should advance the unique role of the FCC in administering and enforcing the Communications Act in support of their effort to *evade* compliance with an FCC ruling aimed at implementing the Communications Act.

The important role served by private enforcement of FCC "orders" pursuant to Section 401(b) is well-illustrated in this case. If the Preemption Order were not enforceable under Section 401(b), all the state commissions could with impunity decline to comply with the Preemption Order's requirements until the FCC commenced and concluded an adjudicatory proceeding as to each. In each such case, the FCC would have to repeat the unequivocal command in the Preemption Order that the state commissions apply the FCC-prescribed depreciation rates in setting charges for intrastate telephone service. The ability of the FCC to commence and conclude such proceedings expeditiously would, of course, be constrained by the FCC's limited resources. But while FCC action was awaited,⁴⁶ or while possibly pro-

44. Memorandum of Federal Communications Commission as Amicus Curiae in Support of Petition for Rehearing, at 14 (July 27, 1984), *New England Telephone*, *supra* (footnotes omitted) (emphasis added) (hereinafter "FCC Amicus Brief").

45. E.g., *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778, 2782 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . .") (footnote omitted); *Investment Company Institute v. Camp*, 401 U.S. 617, 626-27 (1971).

46. As the Fifth Circuit observed in *South Central Bell Telephone Co.*, *supra*, there could be situations "in which only a private party would have a sufficient interest in the obedience of an FCC rule to institute an enforcement proceeding." 744 F.2d at 1118. See *FCC v. Sanders Brothers Radio Station*,

tracted adjudicatory proceedings were pending, C&P and other telephone carriers would continue to suffer irreparable harm, at a rate of \$44,000 per day in the immediate case involving C&P. 748 F.2d at 882.⁴⁷

This inefficient and pointless procedure would not be much improved even if the FCC could, under Section 401(a) of the Communications Act, enforce the Preemption Order in federal court directly against each of the fifty state commissions, as the Maryland PSC and the supporting *amici curiae* claim is possible. (Brief for the Petitioner at 32-34; Brief for Supporting *Amici Curiae* at 8-10.) There still would be appreciable delay in state commissions' compliance with the Preemption Order, and in the interim irreparable harm to private parties such as C&P would continue to accrue.

Moreover, the premise that the FCC could itself enforce the Preemption Order in a mandamus suit under Section 401(a) is extremely dubious: Section 401(a) only provides the district courts with jurisdiction over suits brought by the FCC alleging a violation of *the provisions of the Communications Act itself*, but rulemaking or adjudicatory orders obviously are not provisions of the Communications Act.⁴⁸ The difference between violations of

309 U.S. 470, 477 (1940) (observing that a person with a financial stake in the granting of a license may be the only one with sufficient interest to seek judicial review).

47. This debilitating state of affairs would exist even though the FCC in the Preemption Order required the compliance of the Maryland PSC and all state commissions with FCC-prescribed depreciation rates and policies; and by the Prescription Order proceedings, in which the Maryland PSC participated, the FCC defined the exact depreciation rates and methods which C&P was to follow for intrastate and interstate ratemaking purposes.

48. It does not make sense to treat FCC "regulations" (let alone highly specific FCC rulings such as the Preemption Order) as the functional equivalent of the Communications Act itself, as urged by the Maryland PSC and supporting *amici curiae*. (Brief for the Petitioner at 32; Brief for Supporting *Amici Curiae* at 6.) Under general principles of administrative law, administrative agencies may — pursuant to their delegated rulemaking authority — promulgate regulations or issue rulemaking orders that require conduct beyond that specified in a statute; indeed, that is the very purpose of permitting

the Communications Act and even general FCC rules and regulations is highlighted by other provisions of the Communications Act expressly distinguishing between the two.⁴⁹ Accordingly, the import of the Maryland PSC's argument that the Preemption Order is not an "order" for purposes of Section 401(b) is that even the FCC could not enforce it without first concluding an adjudicatory proceeding and entering an adjudicatory order. This is plainly an untenable result.

In contrast to the important role played by private enforcement of the Preemption Order in implementing an important and specific FCC directive, the Court should consider that no unfairness to the Maryland PSC results by virtue of a Section 401(b) suit by C&P to enjoin violation of the Preemption Order, and none is even asserted by the Maryland PSC or the supporting *amici curiae*. The Maryland PSC could have appealed the Preemption Order or the Prescription Orders pursuant to Section 402(a), but chose not to do so; the Maryland PSC had full notice of the Preemption Order, as it was "duly served" upon the Maryland PSC, as required for enforcement of an "order" under Section 401(b); and there is no question that the Maryland PSC has violated the requirements of the Preemption Order.

2. Private Enforcement Does Not Impinge on the FCC's Role in Administering and Enforcing the Communications Act

The Maryland PSC and supporting *amici curiae* contend that the enforcement of FCC rulings such as the Preemption Order by private parties will improperly impinge on the FCC's role in assuring a uniform and consistent interpretation of the Communications Act. (Brief for the Petitioner at 34-39; Brief for

NOTES (Continued)

agencies to promulgate regulations. The Maryland PSC concedes as much elsewhere in its brief, stating that "[i]t is through the valid exercise of its rulemaking power that the FCC makes *new law*" (Brief for the Petitioner at 23) (emphasis added).

49. For instance, the penal provisions of the Communications Act, 47 U.S.C. §§ 501, 502, provide separate penalties for (i) violations of the Act and (ii) violations of FCC rules and regulations.

Supporting *Amici Curiae* at 8-10.) Even if one overlooks the incongruence of this argument — which is made to justify evasion of an FCC ruling intended to mandate uniformity among the states in their use of depreciation rates and methods — it is apparent that none of the suggested "evils" has any substance.

First, the Preemption Order, as noted, was a highly specific ruling that required, in straightforward terms not needing further FCC interpretation, that the Maryland PSC and other state commissions apply the FCC-prescribed depreciation rates and methods in setting charges for intrastate telephone service. This directive was, equally straightforwardly, defied and violated by the Maryland PSC. Accordingly, in this case there was no need for any particular FCC expertise or discretion in determining whether a violation of law had occurred, and hence no need for involving the FCC in an enforcement suit as claimed by the Maryland PSC.⁵⁰ (Brief for the Petitioner at 35.)

Second, should difficult questions of federal communications law or policy arise in Section 401(b) suits, there are ample methods for the district courts to obtain the FCC's views. As the FCC has previously explained:

"If questions of interpretation or basic fact or broad communications policy arise, the enforcing court can and should either refer such questions to the FCC under the doctrine of primary jurisdiction or solicit the FCC's views as an intervenor or as *amicus curiae*. In this way, the FCC's

50. The Maryland PSC incorrectly suggests that courts have historically declined to enforce imperative and immediately effective FCC rulings like the Preemption Order in suits brought by private parties. (Brief for the Petitioner at 32-33.) Neither of the two cases cited involved attempts by private parties to enforce a particular FCC decision requiring any specific action. In *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 409 F. Supp. 800, 814 (D.P.R. 1975), *aff'd*, 553 F.2d 701 (1st Cir. 1977), the court simply determined that it did not have jurisdiction under Section 401(b) to enforce provisions of the Communications Act itself or unspecified FCC "holdings, rulings and policies." Also, in *Kroeger v. Stahl*, 148 F. Supp. 403 (D.N.J.), *aff'd*, 248 F.2d 121 (3d Cir. 1957), the court declined to grant relief upon determining that there was no "order" at all in that the FCC "authorization" at issue "did not direct plaintiff or any one else to do anything." 148 F. Supp. at 406.

principal role as enforcer of the Communications Act is satisfied, and the district court fulfills the specific role Congress made for it in Section 401(b)." FCC *Amicus* Brief, *supra*, at 15 (footnote omitted).⁵¹

The possible need in some cases — but not in the case of the Preemption Order — for the agency's special expertise in applying FCC rulemaking orders therefore does not require that such FCC orders be totally unenforceable under Section 401(b).⁵²

Third, as a fundamental matter, the federal courts should not be held powerless to enforce an FCC order simply because, as the Maryland PSC and supporting *amici curiae* suggest, there may be some difficulty in determining whether the court's injunction order has been fully complied with or if there has been a violation of the FCC order in the first place. (Brief for the Petitioner at 36-38; Brief for Supporting *Amici Curiae* at 10.) By Section 401(b), Congress expressly granted the federal district courts jurisdiction to enjoin violations of FCC orders, and there is no more cause here than in the case of any FCC order — or any statute — to believe that the district courts will not ably and consistently enforce the law.⁵³

51. In *South Central Bell*, *supra*, the Fifth Circuit similarly observed that "through the use of agency intervention and *amicus curiae* briefs, as well as through the application of the doctrine of primary jurisdiction, the courts and the FCC should be able to prevent both significant inconsistent applications of FCC rules and serious judicial encroachment upon FCC responsibilities." 744 F.2d at 1118.

52. See, e.g., *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 305 (1976) (primary jurisdiction referral not required where the "standards to be applied . . . are within the conventional competence of the courts").

53. In fact, in the three cases cited by the Maryland PSC, the district courts appear to have responsibly enforced the Preemption Order as required by Section 401(b). Different evidentiary records were presented in the three cases with respect to whether an adjustment by a state commission in a telephone carrier's rate design and rate of return was designed as a subterfuge to negate the effect of the Preemption Order, and the courts consequently reached different conclusions. *South Central Bell Tel. Co. v. Louisiana Public Service Comm'n*, 578 F. Supp. 227, 237-38 (M.D. La. 1983) (downward adjustment in return on equity made "in the absence of evidence justifying such

In sum, the enforcement of the Preemption Order in this case does not impinge on the FCC's role in shaping federal communications policy. Just the opposite is the case, as the FCC has noted. Through enforcement of the Preemption Order by C&P, the Maryland PSC was required to comply with an unequivocal FCC ruling served upon the Maryland PSC and intended by the FCC to be binding immediately. It is difficult to conceive of a more appropriate instance for private suit under Section 401(b).

an adjustment"), *aff'd*, 744 F.2d 1107 (5th Cir. 1984), *appeal filed*, 53 U.S.L.W. 3449 (U.S. Nov. 30, 1984) (No. 84-870); *New England Tel. & Tel. Co. v. Public Utilities Comm'n of Maine*, 579 F. Supp. 1356, 1362 (D. Me.) (rate design change is not "unsupported by the evidence"), *vacated*, 742 F.2d 1 (1st Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3460 (U.S. Dec. 5, 1984) (No. 84-900); *South Central Bell Tel. Co. v. Kentucky Public Service Comm'n*, Civ. No. 85-02 (E.D. Ky. 1985) (dispute over need for increase in telephone rates in order for carrier to meet the authorized rate of return). Of course, in the case at bar, there were no disputed issues regarding the Maryland PSC's acknowledged violation of the Preemption Order, and it is not alleged that the Maryland PSC failed to comply with the district court's injunction order.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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